

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATALIE A.W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 3:21-cv-05498-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of her application for disability insurance benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

I. Did the ALJ Properly Evaluate the Medical Opinion Evidence?

II. BACKGROUND

On June 19, 2015, plaintiff filed an application for DIB, alleging in her application a disability onset date of January 1, 2013. Administrative Record (AR) 426.¹ Plaintiff's

¹ Due to an overlap between Plaintiff's alleged period of disability and the adjudication of a prior claim, the period at issue in this case began on September 2, 2014. AR 17.

1 application for DIB was denied upon official review and upon reconsideration. AR 198,
2 213. A hearing was held before Administrative Law Judge (“ALJ”) Paul Gaughen on
3 June 20, 2017. AR 39–73. On January 11, 2018, ALJ Gaughen issued a decision
4 finding that plaintiff was not disabled. AR 232–52. On December 27, 2018, the Social
5 Security Appeals Council issued an order remanding the application to the ALJ to
6 resolve inconsistencies in the residual functional capacity (“RFC”) analysis. AR 253–57.

7 ALJ Gaughen then held a new hearing on July 15, 2019. AR 74–134. A
8 supplemental hearing was held before ALJ David Johnson on January 7, 2020, followed
9 by ALJ Johnson’s issuance of a new decision on February 5, 2020, again finding
10 plaintiff to be not disabled. AR 14–38. On May 26, 2021, the Appeals Council denied
11 plaintiff’s request for review. AR 1–6.

12 Plaintiff seeks judicial review of the ALJ’s February 5, 2020 decision. Dkt. 1.

13 III. STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s
15 denial of Social Security benefits if the ALJ’s findings are based on legal error or not
16 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874
17 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a
18 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*
19 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

20 IV. DISCUSSION

21 In this case, the ALJ found that plaintiff had the severe, medically determinable
22 impairments of neurocognitive disorder, post-traumatic stress disorder (“PTSD”), rule-
23 out hoarding disorder, cerebral palsy, depressive disorder, anxiety disorder, headaches,
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1 and fibromyalgia. AR 21. Based on the limitations stemming from these impairments,
2 the ALJ found that plaintiff could perform a reduced range of light work. AR 23–24.
3 Relying on vocational expert (“VE”) testimony, the ALJ found at step four that plaintiff
4 could not perform past relevant work, but could perform other light, unskilled jobs at
5 step five of the sequential evaluation; therefore, the ALJ determined at step five that
6 plaintiff was not disabled. AR 29.

7 A. Whether the ALJ Properly Evaluated Medical Opinion Evidence

8 Plaintiff contends that the ALJ erred in evaluating the medical opinion of clinical
9 psychologist Bill Ekemo, Ph.D., as well as treating physicians Lisa Soehren, D.O., and
10 Michael Adling, D.O. Dkt. 11, p. 1.

11 Plaintiff filed the application for benefits before March of 2017, therefore the older
12 regulations apply. 20 C.F.R. § 404.1527(c)(2). Acceptable medical sources include both
13 licensed physicians and licensed psychologists. *Gomez v. Chater*, 74 F.3d 967, 971
14 (9th Cir. 1996) (citing 20 CFR § 404.1513(a)(1). Pursuant to the rules applicable to this
15 case, in assessing an acceptable medical source, the ALJ must provide “clear and
16 convincing” reasons for rejecting the uncontradicted opinion of either a treating or
17 examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (1995) (citing *Pitzer v. Sullivan*,
18 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.
19 1988)). When a treating or examining doctor’s opinion is contradicted, the opinion can
20 be rejected “for specific and legitimate reasons that are supported by substantial
21 evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d
22 1035, 1043 (9th Cir. 1995)).

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2 i. Opinion of Dr. Ekemo

3 Dr. Ekemo, an examining psychologist who also treated plaintiff during the period
4 at issue, provided a statement concerning plaintiff's limitations on January 16, 2016.
5 See AR 887–93. Dr. Ekemo noted plaintiff's diagnoses of cognitive disorder not
6 otherwise specified, PTSD, cerebral palsy, and cervical intervertebral disc disorder. AR
7 891.

8 Dr. Ekemo stated that plaintiff would have marked limitation in the ability to
9 maintain attention and concentration for at least two straight hours, four times a day; to
10 complete a normal workday and work week without interruptions from psychologically
11 based symptoms; or perform at a consistent pace without unreasonably numerous or
12 lengthy rest periods; and to set realistic goals or plan independently. AR 887–89. He
13 also stated it was likely plaintiff would be absent from work more than three times per
14 month. AR 883.

15 The ALJ gave limited weight to Dr. Ekemo's opinion, reasoning that it was
16 inconsistent with (1) mental status examinations and memory testing in the record; and
17 (2) plaintiff's activities of daily living. AR 27 (citing AR 761, 766, 824, 827, 829, 991,
18 994, 1009, 1045, 1085, 1314, 1348). Because reviewing doctors contradicted Dr.
19 Ekemo's opinion, the ALJ was required to provide specific and legitimate reasons to
20 reject it. See AR 25; *Lester*, 81 F.3d at 830–31.

21 With respect to the ALJ's first reason, inconsistency with the longitudinal medical
22 record can serve as a specific and legitimate reason for rejecting a medical opinion.
23 See, e.g., *Taylor v. Colvin*, 667 F. App'x 256, 257 (9th Cir. 2016) (citing *Ghanim v.*
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1 *Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) and affirming an ALJ's rejection of an
2 examining psychologist's opinion as contrary to treatment notes). Here, the ALJ
3 summarized plaintiff's performance in memory testing and mental status examinations
4 from 2014 through 2019. The ALJ discussed notes from several examinations that
5 found plaintiff to be "alert, oriented, cooperative, appropriately dressed, and adequately
6 groomed," and plaintiff "engaged in conversation, demonstrated normal speech and
7 affect, and exhibited [an] intact attention." AR 27 (citing AR 761, 766, 824, 827, 829,
8 991, 994, 1009, 1045, 1085, 1314). The ALJ also cited to the hearing testimony of
9 medical expert Robert Pelc, Ph.D. AR 27. At the hearing, Dr. Pelc indicated that
10 memory tests administered by Dr. Ekemo showed plaintiff, "in terms of memory
11 functioning [. . .] below average but not significantly below average to a point where she
12 would be essentially having highly significant memory difficulties." AR 27 (citing AR
13 151); see AR 704.

14 With only one exception, all of the mental status examinations on which the ALJ
15 relied were from providers who were evaluating plaintiff for conditions unrelated to her
16 mental health. See AR 761, 766, 824, 827, 829, 991, 994, 1009, 1045, 1085, 1314.
17 Furthermore, the ALJ did not explain how plaintiff's ability to be engaged and
18 cooperative in these brief visits contradicted Dr. Ekemo's opinions regarding her ability
19 to maintain attention and concentration for two hours or longer, complete a full workday
20 and work week without interruption from her symptoms, or set realistic goals and plan
21 independently. Nor did the ALJ explain the nexus between adequate results in memory
22 testing and Dr. Ekemo's opined limitations. AR 27, 887–89. In short, to the extent the
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1 ALJ relied on inconsistency between these objective measures and Dr. Ekemo's opinion
2 to discount the latter, the ALJ's reasoning was unsupported by substantial evidence.

3 With respect to the ALJ's second reason, claimant's participation in everyday
4 activities, indicating capacities that are transferable to a work setting, may constitute
5 grounds for an adverse credibility determination. *Orn v. Astrue*, 495 F.3d 625, 630 (9th
6 Cir. 2007). Yet, disability claimants should not be penalized for attempting to lead
7 normal lives in the face of their limitations. *See Reddick v. Chater*, 157 F.3d 715, 722
8 (9th Cir. 1998) (citing *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987) (claimant
9 need not "vegetate in a dark room" in order to be deemed eligible for benefits)). Here,
10 the activities that the ALJ identified included working 30 hours per week as a nurse,
11 caring for a baby, driving, shopping, and cooking. AR 27 (citing 6E, 13E, hearing
12 testimony).

13 At the hearing, plaintiff testified that she began her part-time nursing job on
14 August 12, 2019 and that the job required her to work three 10-hour shifts per week. AR
15 165-166. The ALJ found that this job, and a prior job plaintiff held, constituted
16 substantial gainful activity, leading the ALJ to deny plaintiff's claim for the period from
17 July 25, 2017, through the date of decision. AR 20–21. The ALJ added:

18 Alternatively, even if either of the work activities were not
19 substantial gainful activity, the step five findings below apply throughout
20 the time period at issue as alternative findings and the claim is denied at
step five, as discussed below, from April 2, 2014, through the date of this
decision.

21 AR 20.

22 But plaintiff testified she had been dismissed or resigned from about ten prior
23 jobs in the past ten years because she was not able to keep up, and the employers did
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1 not find a way to accommodate for her work-related limitations. AR 165-166, 172-177.
2 Regarding the positions she worked in during 2018 and 2019, she testified was asked to
3 resign because she struggled with fatigue and other health concerns, she could not
4 meet the criteria for absences, and could not keep up. AR 165-166, 172-177. Although
5 plaintiff took care of her younger child, her teenage daughter was the subject of a
6 dependency proceeding and guardianship during the period at issue. See AR 95, 178,
7 202, 465–482, 1342-. The other activities listed lack any detail as to the frequency or
8 the intensity with which plaintiff performed them. Plaintiff's activities were not a specific
9 and legitimate reason for discounting Dr. Ekemo's opinion on limitations. Because the
10 ALJ failed to provide any specific and legitimate reason for rejecting that opinion, the
11 ALJ erred.

12 The Court must determine whether this error was harmless. An error is harmless
13 only if it is not prejudicial to the claimant or is "inconsequential" to the ALJ's "ultimate
14 nondisability determination." *Stout v. Commissioner, Social Security Admin.*, 454 F.3d
15 1050, 1055 (9th Cir. 2006).

16 In this case, the ALJ's error was not harmless. Had the ALJ properly considered
17 Dr. Ekemo's opinion, the ALJ may have incorporated limitations opined therein into
18 plaintiff's residual functional capacity. In particular, the ALJ did not include any limitation
19 in the hypothetical about three days per month being the likely number of plaintiff's
20 absences from work. Nor were there any limitations concerning the marked problems
21 that Dr. Ekemo documents concerning plaintiff's reduced ability to maintain attention
22 and concentration for at least two straight hours, four times a day; to complete a normal
23 workday and work week without interruptions from psychologically based symptoms; or
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1 perform at a consistent pace without unreasonably numerous or lengthy rest periods;
2 and to set realistic goals or plan independently. Had the ALJ incorporated such marked
3 limitations, in turn, the ultimate disability determination may have changed.

4 ii. Opinions of Drs. Adling and Soehren

5 Drs. Soehren and Adling drafted letters to plaintiff's employer requesting work
6 accommodations under the Americans with Disabilities Act. Tr. 1333, 1341. Specifically,
7 Dr. Soehren described plaintiff's conditions before noting, "[t]hese [conditions] severely
8 impact her ability to do her job as a Registered Nurse and Lactation Consultant." Tr.
9 1333. She also noted that "[because of these conditions, [plaintiff] needs frequent
10 breaks and shorter work shifts than is typical for this job." Tr. 1333. Dr. Soehren further
11 noted that she has "recommended in the past that work shift should be no longer than 6
12 hours with breaks every 2-4 hours for at least 15 minutes" and that plaintiff "will also
13 require at least 1 hour of the 6 to complete tasks and charting that is not direct patient
14 care." AR 1333. Finally, she concluded that if plaintiff is unable to be accommodated
15 reasonably [by] her current employer, then [she] would be considered disabled from
16 being a Registered Nurse at her current position." Tr. 1333.

17 Likewise, Dr. Adling prepared a letter recommending that plaintiff's "work be
18 adjusted per the Americans with Disability Act to accommodate her conditions with work
19 shifts that should be no more than 2 shifts in a week, or 2 shifts every other week with a
20 3 shift week." Tr. 1341. The ALJ considered these letters and gave them little weight. Tr.
21 28. In explaining his reasoning, the ALJ noted that these opinions related specifically to
22 plaintiff's ongoing employment working 10-hour shifts as a nurse. Tr. 28, 165. This was
23 a reasonable inference, especially given that Dr. Soehren's opinion made plain that
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1 plaintiff needed accommodations in her current job as a nurse. Tr. 1333. Although Dr.
2 Adling did not specifically mention plaintiff's job as a nurse, the fact that he referenced
3 her ability to perform two-to-three shifts in a week corresponds with plaintiff's hearing
4 testimony, where she reported that she "was supposed to be [working] three 10-hour
5 shifts a week" but had been allowed to separate the shifts so that she no longer had to
6 work all three shifts consecutively; rather, she could work one day, take a day off, and
7 then work two days in a row. AR 165.

8 Accordingly, the ALJ reasonably inferred that the opinions related specifically to
9 her job as a nurse, which is a job the ALJ determined she was unable to perform. AR
10 28-29.

11 B. Remand With Instructions for Further Proceedings

12 Plaintiff asks that this Court remand for further proceedings. Dkt. 11, p. 11. "The
13 decision whether to remand a case for additional evidence, or simply to award
14 benefits[,] is within the discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664, 682
15 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an
16 ALJ makes an error and the record is uncertain and ambiguous, the court should
17 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045
18 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy
19 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d
20 at 668.

21 The Ninth Circuit has developed a three-step analysis for determining when to
22 remand for a direct award of benefits. Such remand is generally proper only where

23 "(1) the record has been fully developed and further administrative
24 proceedings would serve no useful purpose; (2) the ALJ has failed to
provide legally sufficient reasons for rejecting evidence, whether claimant

1 testimony or medical opinion; and (3) if the improperly discredited
2 evidence were credited as true, the ALJ would be required to find the
claimant disabled on remand.”

3 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
4 2014)).

5 The Ninth Circuit emphasized in *Leon* that even when each element is satisfied,
6 the district court still has discretion to remand for further proceedings or for award of
7 benefits. 80 F.3d at 1045.

8 Remand for additional proceedings is the appropriate remedy here. The ALJ
9 erred in failing to provide specific and legitimate reasons for rejecting Dr. Ekemo’s
10 opinion on plaintiff’s limitations. This case is remanded to the Social Security
11 Administration for further administrative proceedings – the ALJ is directed to re-evaluate
12 Dr. Ekemo’s opinion and take additional evidence and testimony as necessary.

13 CONCLUSION

14 Based on the foregoing discussion, the Court finds the ALJ erred when he
15 determined plaintiff to be not disabled. Defendant’s decision to deny benefits therefore
16 is REVERSED and this matter is REMANDED for further administrative proceedings.

17 Dated this 2nd day of May, 2022.

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Theresa L. Fricke
21 United States Magistrate Judge
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